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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Gas Works Division of The United Gas Improvement Company and the Public Service Commission of the State of New York pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 24, 1967.

Opinions Below

The opinion and judgment of the Court of Appeals (Appendix, *infra*) is not yet officially reported. The case is entitled *Continental Oil Co. et al.* v. *Federal Power Commission et al.*, 5th Cir. Nos. 23188 *et al.* The Court's decision was issued in three groups of consolidated appeals; the instant petition, however, is addressed only to the determination in one group of appeals (Nos. 23454 and 23455 below) in which the instant petitioners were petitioners for review of a determination of the Federal Power Commission (FPC).

The opinion and order of the Federal Power Commission is reported at 34 FPC 1001, rehearing denied 34 FPC 1367.

Jurisdiction

The judgment of the Court of Appeals affirming the Commission's order (and remanding for further proceedings) was entered on May 24, 1967. The jurisdiction of this Court is invoked under 28 USC §1254(1) and §19(b) of the Natural Gas Act, 15 USC §717r(b).

Statute Involved

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. §717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. §717f(c)

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed

> construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. §717f(e):

> * * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Questions Presented

(1) In passing upon producer certificate applications under Section 7 of the Natural Gas Act may the Federal Power Commission, consistent with this Court's *Catco* decision,[1] elevate its previously determined in-line certificating level by reference to: (a) the prices contained in the contracts for which certificate authority is being sought, (b) the prices contained in temporary certificates issued on an *ex parte* basis pending the outcome of the statutorily required hearing on the underlying certificate applications, and (c) the "guideline" prices contained in the Commission's Statement of General Policy?[2]

(2) When, in a producer certificate proceeding, an issue is raised as to whether there is any need on the part of the purchasing pipelines or their customers for the additional gas supplies proposed to be sold in interstate commerce by the producer applicants, or as to whether the proposed additional acquisitions will subject the pipeline purchasers to contractual obligations to pay for gas they are unable to take or to use, may the Commission grant permanent certificates for the sales without requiring evidence or making a finding that such need exists?

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1. *Atlantic Refining Co.* v. *Pub. Serv. Comm. of N. Y.*, 360 U. S. 378 (1959).

2. FPC, Statement of General Policy No. 61-1, 24 FPC 818 (1960), amended 28 FPC 441 (1962).

Statement

Introduction

1. As noted in the opinion of the Court below (Appendix, pp. 20a-25a), the first question presented in the instant petition had previously been presented to and decided by two other courts of appeal in prior FPC review proceedings. *Sunray DX Oil Co.* v. *Federal Power Commission (Sunray)*, 370 F.2d 181 (10th Cir. 1966) and *Public Service Com'n of N. Y.* v. *Federal Power Commission (Hawkins)*, 373 F.2d 816 (D.C. Cir. 1967). The decisions of the 10th and DC Circuits on this question were, as the court below observed, irreconcilably in conflict, with the 10th Circuit answering in the affirmative and the DC Circuit in the negative. In this case, the 5th Circuit chose to align itself with the 10th.

Petitions for writs of certiorari to review the *Sunray* decision of the 10th Circuit on the initial price issue were filed in March 1967 by the instant petitioners and are now pending before the Court in *The United Gas Improvement Company* v. *Sunray DX Oil Company et al.* and *The Brooklyn Union Gas Company et al.* v. *Federal Power Commission et al.*, Nos. 61 and 62, October Term, 1967. The Federal Power Commission has acquiesced in the granting of these petitions.[3]

Petitions for writs of certiorari to review the *Hawkins* decision of the DC Circuit on the same issue were filed in the spring of 1967 by the Federal Power Commission and

3. See Memorandum for the Federal Power Commission, dated April 1967 in these numbers.

producer interests and are now pending before the Court in *Shell Oil Company* v. *PSC of N.Y., Skelly Oil Company et al.* v. *PSC of N. Y. et al., FPC* v. *PSC of N. Y. et al.* and *Superior Oil Company* v. *FPC et al.*, Nos. 111, 143, 144 and 231, October Term, 1967. Those of the instant petitioners who are respondents in these numbers, believing that the conflict should be resolved, have acquiesced in the granting of the *Hawkins* petitions.[4]

2. The second question presented by the instant petition was not in issue in the *Sunray* case. It was, however, along with the initial price issue, the subject of review in the *Hawkins* case in which the DC Circuit held,[5] correctly, we submit,

> "* * * that when a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a permanent certificate to the producer.[33] '[A] certificate shall be issued * * * authorizing the * * * sale * * * if * * * the proposed * * * sale * * * is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied.'[34]"

33. *Cf. Federal Power Commission* v. *Texaco, Inc.*, 377 US 33, 42-44, 84 S. Ct. 1105, 12 L. Ed. 2d 112 (1964), and *Federal Power Commission* v. *Hunt*, 376 US 515, 525-26, 84 S. Ct. 861, 11 L. Ed. 2d 878 (1964).

34. 15 USC §717 f(e) (1964).

The court below, after noting the DC Circuit's decision on this issue (Appendix, pp. 26a-27a) disagreed with that

4. See Memorandum for Respondents, dated June 7, 1967 in these numbers.

5. *Public Service Com'n of New York* v. *Federal Power Commission*, 373 F.2d 816, at pp. 823-24.

court's holding. Thus, the 5th Circuit held that whether there was any need for the gas proposed to be sold was not a relevant issue in the producer certificate proceeding in which FPC authorization for the sale was requested, and that, accordingly, permanent authorization for the sale could properly be granted without any finding or evidence on the subject of need, even when that issue was contested. As a result, the decision in this case created another irreconcilable conflict between the circuits on an issue which is fundamental to the proper administration of the certificate provisions of the Natural Gas Act.

Certiorari to review the decision of the DC Circuit on the need issue was also sought by some of the producer interests in their petitions, hereinabove referred to, filed in the *Hawkins* case. In view of the conflict on that issue created by the decision below, those of the instant petitioners who are respondents in *Hawkins* have also acquiesced in the granting of the petitions on that issue. The FPC, however, which was aligned with the producers on the need issue in the review proceeding in the DC Circuit, has filed a memorandum in No. 231 in opposition to the request for certiorari on that issue. The FPC's position, which is not entirely clear to the instant petitioners, seems to suggest, *inter alia,* that the Commission is prepared to observe the strictures of the DC Circuit as to the requirement for evidence and findings on the need issue, when contested.

In summary, therefore, as to each of the questions presented by the instant petition, there are

(1) conflicting decisions in two or more courts of appeal, and

(2) previously filed petitions for certiorari pending before this Court.

Specific Background of This Case

In view of the inter-relationship and similarities, described above, between this case and the *Sunray* and *Hawkins* cases in which petitions for certiorari are pending, petitioners believe it is unnecessary to burden the Court with a detailed description of prior proceedings in this case. Therefore, in the interests of avoiding unnecessary repetition and duplication, we respectfully refer the Court to the Statement at pages 3-11 of the Petition for a Writ of Certiorari of The Brooklyn Union Gas Company, *et al.* in the *Sunray* case (No. 62, October Term, 1967).[6]

Reasons for Granting the Writ

This case presents a threshold issue as to the scope and proper exercise of the Commission's power to issue permanent certificates of public convenience and necessity for sales of natural gas in interstate commerce, and a vital issue as to the responsibility of the Commission to determine and impose appropriate price conditions when it has been decided that such authorization should be granted.

By its decision on the latter issue the court below emphasized a preexisting conflict between the DC and 10th

6. The decision of which review is sought here was issued by the 5th Circuit on appeal from the FPC's determination in its proceeding which is identified and described in the incorporated material (at pp. 9, 10 and 11) as *Turnbull & Zoch Drilling Co., et al.*

Circuits as to the appropriate method, under the Natural Gas Act and prior decisions of this Court, of determining in-line producer initial prices. By its decision on the former issue, the court below created a conflict with a decision of the DC Circuit as to a fundamental prerequisite for the authorization of any interstate natural gas sale at any price. Review on both issues has been sought in this Court by previously filed petitions for certiorari. If those petitions are granted, the orderly administration of justice and the necessity for resolving conflicts between the circuits on important issues of law dictate that the instant petition be granted as well.

Further, and much to petitioners' regret, the continued importance to the consumer of producer certificate proceedings as the only vehicle for combating excessive price exactions makes it imperative to continue to call upon this Court to prevent progressive erosion of its *Catco*[7] and *Callery*[8] doctrines. Due to the extraordinarily protracted delay in developing and putting into effect just and reasonable producer rates under Sections 4 and 5 of the Natural Gas Act—and the end of that "nigh interminable" process is not yet in sight—the only viable procedure for affording consumers some degree of protection against irremediable price exactions continues to be the in-line producer certificate proceeding. Until the day of just and reasonable producer rate regulation becomes a reality, this Court should not permit its repeated teachings as to the proper interim

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7. *Atlantic Refining Co.* v. *Pub. Serv. Comm. of N. Y.*, 360 US 378 (1959).

8. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 US 223 (1965).

function and objectives of such certificate proceedings to be weakened and diluted to the detriment of the consuming public.

Conclusion

Sound administrative procedures require that the Natural Gas Act be applied uniformly throughout the circuits. Even more important, the Act's basic purpose to protect the consumer against excessive producer rates and unnecessary pipeline gas costs requires that the decision below be reviewed and vacated. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 1967

APPENDIX

Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 23188, 23189, 23325, 23333, 23408

CONTINENTAL OIL COMPANY; AUSTRAL OIL COMPANY, INCORPORTAED; BRIGHT AND SCHIFF; BLANCO OIL COMPANY AND KILLIAN AND HURD; SHELL OIL COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

THE BROOKLYN UNION GAS COMPANY; LONG ISLAND LIGHTING COMPANY; PHILADELPHIA GAS WORKS, DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY,

Intervenors.

Nos. 23454, 23455

THE BROOKLYN UNION GAS COMPANY; LONG ISLAND LIGHTING COMPANY; PHILADELPHIA GAS WORKS, DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

TEXACO, INC.; GULF OIL CORPORATION, INC.; HUMBLE OIL COMPANY, INC.; AUSTRAL OIL COMPANY, INC.; MCCURDY AND MCCURDY; SUN OIL COMPANY; PAN AMERICAN PETROLEUM CORP.; JONNELL GAS, INC.; BRIGHT AND SCHIFF, SHELL OIL COMPANY,

Intervenors.

Nos. 21286, 21575

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST; H. L. HUNT, HUNT OIL COMPANY, LAMAR HUNT, TRUSTEE FOR WILLIAM HERBERT HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; GEORGE W. GRAHAM, INC., PLACID OIL COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

No. 21856

HUNT OIL COMPANY; LAMAR HUNT, TRUSTEE FOR WILLIAM HERBERT HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, PLACID OIL COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Review and Set Aside Orders of the Federal Power Commission

(May 24, 1967.)

Before BROWN, BELL and DYER, Circuit Judges.

DYER, Circuit Judge: Three groups of cases raise in a variety of ways the validity of the Federal Power Commission's "in-line" price pronouncement, its statement of general policy, moratorium ceilings, and refund requirements.

In the first group the producer petitioners[1] pursuant to § 19 (b) of the Natural Gas Act,[2] challenge an order of the

[1] Nos. 23188, 23189, 23325, 23333 and 23408. Upon motion of Petitioner Bright & Schiff in No. 23325 leave was granted to withdraw its petition for review and the proceeding was dismissed on June 21, 1966.

[2] The Natural Gas Act was approved June 21, 1938, 52 Stat. 821-833, and thereafter amended from time to time, 15 U.S.C.A. 717-717w. Section 19 (b) was amended 72 Stat. 941, 947; 15 U.S.C.A. 717r.

FPC of September 30, 1965, in a consolidated proceeding entitled Turnbull & Zock Drilling Co. (operator) et al., Opinion No. 478, granting permanent certificates of public convenience and necessity under § 7 (c) and (e) of the Act to sixty seven producers to undertake new sales of natural gas from Texas Railroad Commission District No. 4[3] to interstate pipelines contracted between 1956 and 1964.

The producers had proposed initial prices for their sales ranging from 14.5¢ to 20.045¢ per Mcf.[4] The FPC applying its previously announced in-line price schedule issued its permanent certificates conditioning them so that the initial price for the sales contracted prior to September 28, 1960, should not exceed 15¢, and for those after that date 16¢. A temporary restriction (moratorium) was placed on the filing of increased rates above 18¢ until the issuance of a decision in the Area Rate Proceeding,[5] covering District 4, or January 1, 1968, whichever is earlier.

The producer-petitioners[6] variously object that the initial prices are too low, that exceptions from generally prescribe in-line initial price should have been allowed for some sales, and that the moratorium on increases over 18¢ was erroneously imposed. The second group, eastern seaboard distributor-petitioners[7] object principally that the 16¢ initial price for contracts executed after September 28, 1960, was too high. They, as well as some of the producer-

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[3] An area of 15 counties in Southern Texas.

[4] All but one of the sales had been temporarily authorized under § 7 (c) of the Act and § 157.28 of the Commission's regulations (18 C.F.R. 157.28). These certificates were issued *ex parte*, by letter orders, upon the producers' sworn statements asserting a variety of emergency conditions, which, they claimed, required immediate authorization to commence the sales in question.

[5] Texas Gulf Coast Area Rate Proceeding. Docket AR64-2.

[6] See note 1 *supra*.

[7] Nos. 23454 and 23455.

petitioners also object to the action of the Commission in deferring the question of whether or not refunds of amounts collected by the producer-petitioners in excess of the in-line prices would be required.

The Distributors[8] intervened in partial support of the Commission's order in some of the Producers' cases.[9] Producer-petitioner Austral Oil Co., Inc.[10] intervened in partial support of the Commission's order in the Distributor cases.[11]

The third group comprises the three Hunt petitioners.[12]

In 21286 petitioners[13] had negotiated gas purchase contracts in 1959 with interstate pipeline companies for sales for a twenty year period from reserves in Texas Railroad Commission Districts 2, 3 and 4 at an initial contract price of 20¢ per Mcf. By order of December 9, 1963, Opinion 412, the FPC issued permanent certificates conditioned so that the initial price should not exceed 15¢ for sales in Districts 2 and 4 and 16¢ in District 3; and that petitioners refund with 7% interest the difference between the contract rates and the initial prices determined by the Commission paid by the pipeline purchaser subsequent to November 2, 1961.

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[8] See Note 7 *supra.*

[9] Nos. 23188, 23189, 23325 and 23408.

[10] It is joined by other grantees of certificates issued by the order, McCurdy and McCurdy, Sun Oil Co., Pan American Petroleum Corp., Gulf Oil Corp., Humble Oil & Refining Co., Jonnell Gas, Inc. and Texaco Inc.

[11] See note 7 *supra.*

[12] Nos. 21286, 21575 and 21856.

[13] Margaret Hunt Hill, Trustee for Hassie Hunt Trust, H. L. Hunt, Hunt Oil Company, Lamar Hunt, Trustee for William Herbert Hunt Trust Estate, A. G. Hill, Trustee for Lamar Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Company.

In No. 21575[14] by order of February 24, 1964, opinion 412A granting permanent certificates, the FPC proscribed the filing of any price increase in excess of 19¢ in District 3 and in excess of 18¢ in Districts 2 and 4 until a final decision was issued by the Commission in the Area Rate Proceeding covering these districts, or until January 1, 1968, whichever is earlier.

In 21856 the producer-petitioners[15] whose sales were in Districts 2 and 4 and filed notices of change,[16] reducing the price from 18¢ (which they were collecting under the temporary certificates) to 15¢ (the reduced price under Opinion 412) with an immediate increase to 18¢ (the moratorium level established in Opinion 412A). Similar action was taken as to sales in District 3. The 20¢ contract price was reduced to 16¢, the "in-line" price, and immediately increased to 19¢, the price moratorium level.

The FPC rejected the attempted change for Districts 2 and 4 and accepted for filing the change for District 3, then suspended it. The latter change ultimately was permitted to go into effect subject to refund.

The Hunt petitioners[17] assert that the in-line prices are too low, that they were denied administrative due process, that 7% interest ordered to be paid on refunds is exorbitant, that the price moratorium was unreasonable, and that the price increase was improperly rejected.

All of the causes were set for oral argument at the same time because, although there are several peripheral ques-

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[14] See note 13 *supra*.

[15] Hunt Oil Company, Lamar Hunt, Trustee for William Herbert Hunt Trust Estate, A. G. Hill, Trustee for Lamar Hunt Trust Estate and Placid Oil Company.

[16] The attempted change in rates was sought to be accomplished pursuant to § 4 (e) of the Natural Gas Act, 15 U.S.C.A. § 717 (c) (e).

[17] See notes 12, 13 and 15 *supra*.

tions involved, there is an identity of principal issues. The causes are likewise treated here.

"In-Line" in §7 Applications

The nature and scope of the FPC's duty to review producer price proposals before permitting natural gas to enter the interstate market has been so thoroughly litigated in the past few years that it might be thought that the picture to be drawn from the decided cases could be painted with a light brush. Unfortunately this is not so. Not the least of the problems being the continuous flow of new opinions from our sister courts, five of which have come out since submission of this case, and requiring a choice among several conflicting holdings.[18]

When in 1954 it was held in *Phillips I*[19] that the FPC had the statutory responsibility for regulating interstate sales by natural gas producers, the FPC was faced with two major problems. The first was to determine the just and reasonable rates under Sections 4 and 5 of the Natural Gas Act[20] for producer sales in interstate commerce. The second was to develop a standard which would permit new sales to be made under pricing arrangements that would protect all interests pending determination of just and reasonable rates.

The Supreme Court made clear in *Catco*[21] that in cases under §7 of the Act[22] it is the responsibility of the FPC

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[18] *Sunray DX Oil Company et al.* v. *FPC*, 10 Cir. (12-9-66), 370 F.2d 181; *Skelly Oil Company, et al* v. *FPC*, 10 Cir. (1-20-67), ... F.2d .....; *Public Service Commission of New York, et al.* v. *FPC, D.C.* Cir. (2-7-67), ... F.2d .....; *Pan American Petroleum Corporation, et al.* v. *FPC*, 10 Cir. (3-9-67), ... F.2d .....; *Standard Oil Company of Texas, et al.* v. *FPC*, 10 Cir. (3-27-67), ... F.2d ..... Petitions for certiorari have been filed in all these cases.

[19] *Phillips Petroleum Co.* v. *Wisconsin, et al.*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

[20] 15 U.S.C.A. § 717 c and d.

[21] *Atlantic Refining Co. et al.* v. *Public Service Commission of New York*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312.

[22] 15 U.S.C.A. § 717 f.

to make certain that the consumer is protected against excess charges between the time the gas first enters the interstate market and the time—many years later—that a rate investigation is concluded and a just and reasonable rate is fixed by final order. This is accomplished by the imposition of a rate condition in the grant of an initial certificate, either temporary or permanent, whenever an initial price is not in keeping with the public interest because it is "out of line".[23]

Following *Catco* and the Third Circuit's Transco-Seaboard decision[24] a number of circuits wrote on the in-line price concept.[25]

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[23] In *Catco* the court said "where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in the triggering of general price rises or increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." (360 U.S. 378 at 391)

[24] *U.G.I.* v. *P.S.C. of New York*, 3 Cir. 1959, 269 F.2d 865 (subsequently vacated sub nom. *P.S.C. of New York* v. *F.P.C.* (1959), 361 U.S. 195, 80 S.Ct. 292, 4 L.Ed. 2d 237).

[25] *California Co.*, 22 FPC 252, rehearing denied, 22 FPC 653, set aside sub nom. *U.G.I.* v. *F.P.C.*, 9 Cir., 283 F. 2d 817, cert. den. sub nom. *Superior Oil Co.* v. *U.G.I.*, 365 U.S. 879 and *California Co.* v. *U.G.I.*, 365 U.S. 881; *Sun Oil Co.*, 22 FPC 351, rehearing denied, 22 FPC 654, set aside sub nom. *U.G.I.* v. *FPC*, 5 Cir., 290 F.2d 133 cert. den. sub nom. *Sun Oil Co.* v. *U.G.I.*, 368 U.S. 823; *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rehearing denied, 22 FPC 652, set aside sub nom. *U.G.I.* v. *F.P.C.*, 10 Cir., 287 F.2d 159; *Superior Oil Co.*, 22 FPC 369, rehearing denied, 22 FPC 655, set aside sub nom. *U.G.I.* v. *F.P.C.*, 5 Cir., 290 F.2d 147, cert. den. sub nom. *Superior Oil Co.* v. *U.G.I.*, 366 U.S. 965; *Texas Gas Transmission Corp.*, 22 FPC 378, rehearing denied, 22 FPC 657, set aside sub nom. *P.S.C. of New York* v. *F.P.C.*, D.C. Cir., 287 F.2d 146, cert. den. sub nom. *Hope Natural Gas Co.* v. *P.S.C. of New York*, 365 U.S. 880; *Shell Oil Co.* v. *P.S.C. of New York*, 365 U.S. 882; *California* v. *F.P.C.*, 9 Cir., 353 F. 2d 16, affirming 32 F.P.C. 34.

After some of the petitions were filed in these cases[26] the Supreme Court decided *Callery*[27] reversing the decision of this Court[28] and holding that (a) in a §7 certificate proceeding the FPC is not required to consider cost, economic and related evidence; (b) it has the power to condition permanent certificates to forbid the filing of rate increases above a specified level for a limited period of time, and (c) it has the statutory authority to order refunds of amounts collected pursuant to permanent certificates which were subsequently judicially reversed.[29] The Court approved FPC orders which conditioned permanent certificates at a price in line with the price level at which substantial amounts of gas had been certificated to enter the interstate market under contemporaneous certificates.

The "In-Line" Conclusions Reached

The FPC having been vindicated in the use of an in-line price method, there remains the question of whether the Commission's determinations of in-line price levels in these cases are supported by the evidence and are well founded in law.[30]

Of the sales for which permanent certificates were issued by the order in Turnbull and Zock, some were contracted before September 28, 1960, some between that date and

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[26] Nos. 21286, 21575 and 21856 previously filed were held in abeyance pending the outcome of Callery.

[27] *United Gas Improvement Co. et al.* v. *Callery Properties, Inc., et al.*, 382 U.S. 223, 86 S.Ct. 360, 15 L.Ed. 2d 284 (1965).

[28] *Callery Properties, Inc.* v. *FPC*, 5 Cir. 1964, 335 F.2d 1004.

[29] These issues, some of which were controverted before the Commission and raised in this review proceeding, are now set at rest by *Callery*.

[30] Our discussion is first directed to the petitioners under Turnbull and Zock. See note 1 *supra*. The petitions in Hunt, notes 12, 13 and 15 *supra*, are treated subsequently unless otherwise noted.

August 31, 1962, and some thereafter.[31] There is significance in these dates because of the effect of the Statement of General Policy[32] No. 61-1, issued on September 28, 1960, and the Fifth Amendment thereto[33] issued on August 30, 1962. Among other things this policy statement established guide line prices for each marketing area, below which the FPC would exercise its rate and certificate powers without full investigation and hearing, unless there were objections. New sales that were contracted for prices above the guide line would not be allowed to start above that level. Thus, by observing the guidelines Producers could generally avoid involvement in the investigation, hearing and regulatory procedures they would otherwise have to go through.

As before noted, we are here concerned with both pre-Policy and post-Policy sales contracts, which were ultimately authorized by permanent certificates conditioned so that the initial price for sales contracted prior to September 28, 1960, should not exceed 15¢ per Mcf and those thereafter 16¢ per Mcf.

These in-line certificate prices for District 4 have been considered and upheld by the Court of Appeals for the District of Columbia and the Tenth Circuit. In *Skelly*[34] the District of Columbia Circuit concluded that, in the period prior to September 28, 1960 (the Statement of General Policy date)[35] the FPC could declare an in-line price of 15¢ per Mcf for District 4.

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[31] Temporary certificates had been granted for all but one (which is not here under review) of these sales under F.P.C. Regulations and under the Natural Gas Act, § 157.28 (18 C.F.R. 157.28).

[32] 24 FPC 818.

[33] 28 FPC 441.

[34] *Public Service Commission of New York* v. *FPC*, D.C. Cir. 1964, 329 F.2d 242, cert. den. sub nom. *Prado Oil and Gas Co.* v. *FPC*, 1964 377 U.S. 963, 84 S.Ct. 1647, 12 L.Ed. 2d 735.

[35] See note 32 *supra*.

In *Sunray DX*[36] the Tenth Circuit considered contracts dated between September 28, 1960,[37] the date of issuance of the initial Statement of General Policy and August 30, 1962,[38] and concluded that the FPC could declare an in-line price of 16¢ per Mcf for District 4.

Like their *Skelly* and *Sunray DX* counterparts the Turnbull and Zock applications, here under consideration, involved sales in the same producing area, both before and after September 28, 1960, some by the same producers. We are in agreement with *Skelly* and *Sunray DX*, upholding the in-line price determination of the FPC and conclude that in these cases its action on that issue should be affirmed.

The Pre-Policy Statement 15¢ Level

Without belaboring the analysis of prices in District 4 made by the Examiner and approved by the FPC, a recapitulation for the period January 1, 1958, through September 27, 1960, shows this. The average of all permanently certified sales weighted by volume is 14.20¢ per Mcf. Out of 39 temporary certificates 38 were issued at prices between 16.0¢ and 18.0¢ per Mcf. The largest number of contracts and the largest volumes were at 15.0¢ per Mcf. And the average between the median price and the highest group of prices is 15.14¢ per Mcf.

The FPC's finding of an in-line price of 15¢ is based upon the principle that the price line is not established by the highest price or prices permanently authorized, but falls between the highest group of prices and the median price. We think this is a permissible criteria to apply. The Producers emphasize heavily the statement in *Callery*[39]

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[36] *Sunray DX Oil Company, et al.* v. *FPC*, 10 Cir. 1966, 370 F.2d 181, now pending on petition for certiorari.
[37] See note 32, *supra*.
[38] See note 33, *supra*.
[39] 382 U.S. 223, 227.

that: "We believe the Commission can properly conclude under §7 that adequate protection to the public interest requires as an interim measure that gas not enter the market at prices higher than existing levels." But, as the Tenth Circuit observed in *Sunray DX*,[40] "This language does not mean that the public interest is not protected if the sales are approved at less than existing levels." This conclusion is consonant with *Catco's* admonition to halt the escalation of prices that had been and were taking place.

Distinctive Objections

Various Producer-petitioners assert special contentions not joined in by all, thus Continental[41] urges that the exclusion of intrastate data from the price line determination was arbitrary and capricious. Except for the testimony of one witness concerning nine sales, four of which are jurisdictional and five of which are non-jurisdictional, there was no comparison of intrastate prices with interstate prices because the former were unavailable. We agree with the FPC that this evidence was too fragmentary to support an inference that intrastate prices make it advantageous for sellers to market their supplies under non-jurisdictional contracts.

Continental also contends that in four separate § 7 proceedings since 1962, involving the same area, the FPC has not found it necessary to use prices below 14¢ in finding this to be the priceline, but here it could not use the same type data and get the answer it wanted, so it used data for sales below 14¢. Except when such sales are not generally comparable to Producer sales, we see no reason why they should not be considered in order that the in-line price

[40] See note 36 *supra*.

[41] No. 23188.

determination might be based on a complete range of relevant price data. In any event, we are not impressed with Continental's attack on the non-exclusion of below 14¢ sales here for, whatever weight the FPC gave such sales, it was not enough to change its in-line determination from the 15¢ it found in *Skelly* which the District of Columbia Circuit approved.

Continental, joined by Hunt, complain that the FPC did not give them notice of the FPC's standards and adequate opportunity to meet the standards. We have already discussed some of the Producer's objections advanced to support this charge. We note that the Hunt hearing, after court remand, began on March 28, 1962, and that the Turnbull and Zock proceeding was not initiated until May 28, 1964. In 1959 *Catco* decided that the FPC is not obligated in § 7 proceedings to determine the just and reasonable price for the gas sold, it being sufficient to determine the in-line price. In applying this concept many decisions thereafter dealt with the interpretation of the in-line standard, and the weight to be accorded various kinds of evidence in applying that standard.[42] Furthermore, the FPC by its decision in *Continental Oil Co.*, 27 F.P.C. 96, July 22, 1962, made clear that contemporaneous sales price data were of major importance. Again, on March 21, 1962, in *Ohio Oil Co., et al.*, 27 F.P.C. 551, the determining factor was said to be contemporaneous sale price data. By May 28, 1964, (when the Continental proceeding was initiated) *Skelly* had been affirmed by the District of Columbia Circuit and the FPC had fixed the initial prices in its *Amerada* case. Thus all parties were on notice of the standards to be applied and given an adequate opportunity to present relevant evidence. The situation therefore in no way resembles that

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[42] See cases collected in note 25.

in *Margaret Hunt Hill, Trustee,* v. *F.P.C.*, 5 Cir., 1964, 335 F.2d 355.

Austral contends that it was discriminatory for the FPC to make applicable to it the in-line price of 15¢ based upon permanently certificated sales under contracts dated between January 1, 1958, and September 28, 1960, even though Austral's sale was made pursuant to a contract with Natural Gas Pipeline Company dated September 1, 1960. Austral argues that the cut-off date of September 28, 1960, is arbitrary and that sales made under contracts thereafter should be considered.

The Commission used September 28, 1960, as a cut-off because on that date it issued Statement of General Policy No. 61-1 and thereby established guideline prices. The evidence shows that as a result of this regulatory action there was a change in the level of contract prices. We agree with the Examiner that "A comparison of prices both before and after September 28, 1960, would therefore be a comparison of prices based upon dissimilar circumstances and would not reflect the current conditions in the industry." Both *Skelly* and *Sunray DX* have accepted the separate time periods as appropriate, and we think this is in keeping with the public convenience and necessity.

Hunt Petitions

Proceedings in these cases (see notes 12, 13 and 15) were stayed by the court pending the outcome of *Callery*. That decision settled the contentions of the Producers that the FPC lacked the power to exclude cost evidence in a § 7 proceeding, to order refunds of rates collected during temporary authorization, and to impose a moratorium on the filing of price increases as a condition to the issuance of

permanent certificates. Petitioners now contend that the FPC improperly exercised the power it was found to have.

Hunt's Procedural Complaints

We have above discussed and rejected these petitioners' argument that they were denied administrative due process because they did not receive notice that the only evidence that would be considered would be that relating to the in-line price. To this we would only add here that these petitioners elected to disregard the burden cast upon them to sustain the in-lineness of their rates. Rather they simply took and stood upon the position of respondents, who have no burden of proof.

These petitioners also argue that they were denied the opportunity to submit rebuttal evidence concerning Staff Exhibit No. 236, which was intended to update Staff Exhibit No. 60 previously used in the original proceeding which had culminated in the granting to petitioners of permanent certificates that were subsequently set aside and replaced with temporary certificates.[43] Petitioners were granted a three week's recess in which to prepare for cross-examination, and when the hearings resumed they asked for a further adjournment of some two weeks to prepare rebuttal evidence. The Examiner refused to grant a further continuance. Under the circumstances we find no abuse of discretion.

In-Line Determinations

Petitioners' contracts for the sale of gas here on review were dated May 15, 1959. Petitioners attack the FPC's

[43] In *P.S.C. of New York* v. *F.P.C.*, D.C. Cir. 1961, 29 F.2d 140, cert. den. sub nom. *Shell Oil Co.* v. *P.S.C. of New York*, 368 U.S. 948, it was held that the Public Service Commission of New York had been improperly denied leave to intervene in the certificate hearing and remanded the case to the Commission. See also *Hunt Oil Company* v. *FPC*, 5 Cir., 1964, 344 F.2d 474.

determination of the in-line price to be 15¢ for Texas Railroad Commission Districts Nos. 2 and 4 and 16¢ for Texas Railroad Commission District No. 3. They particularly object to the exclusion of permanently certificated sales to Coastal Transmission Company and Truckline Gas Company as being "suspect", the period of time utilized for comparability, and the use of estimated rather than actual volumes.

As the petitioners adduced no evidence, the in-line prices were determined by considering the various sales permanently certificated for the calendar years 1958 to September 28, 1960, as shown on Staff Exhibit No. 236, eliminating from consideration all sales at prices below 14¢ (about which petitioners do not complain). Sales only temporarily authorized were substantially eliminated. Sales that were suspect were not used.

In District No. 2 there were 29 sales at or below 15¢ per Mcf, having an estimated first month volume of 2,347,765 Mcf. There were six contracts having an estimated first month volume of 635,000 Mcf above 15¢ per Mcf. This we find was a sound basis for the FPC's finding of an in-line price of 15¢ for District No. 2.

In District No. 3 there were twenty-four permanently certificated sales having an estimated monthly volume of 886,995 Mcf at prices between 14¢ and 16¢ per Mcf. There were three at 16.14967 per Mcf with initial monthly volumes of 467,500 Mcf. The other prices were not considered, because they were either in litigation, under review or "suspect".

In District No. 4, with one exception that is insubstantial, there were no contracts permanently certificated at prices above 15¢ per Mcf, except those excluded in the same categories as in District No. 3.

Staff Exhibit 23 also included the sales relied upon by the FPC in *Skelly Oil*[44] and *Texaco-Seaboard, Inc.*[45] In these cases the FPC had found that the in-line price for District No. 3 was 16¢ and for District No. 4 was 15¢.[46] We think that the FPC acted properly in comparing the evidence in its Staff Exhibit here with the evidence in those cases and certainly had ample basis for concluding that there were no substantial dissimilarities sufficient to warrant a higher in-line price.

We are not impressed with the contentions of petitioners that actual instead of estimated volumes should have been used in the staff compilations. This was usual FPC procedure and is predicated upon the fact that the buyer and seller in determining price do not await deliveries but make estimates of reserves that are stated in their contracts. These estimates are one of the underlying elements in determining the consideration for the contracts and are probably a better criteria of existing market prices than are later variations from those estimates. *Skelly, supra.*

What we have heretofore said makes it unnecessary to extend this opinion further concerning petitioner's complaint that there is no comparability of contracts in point of time.

Finally, the petitioners challenge the in-line price of 16¢ in District No. 3, because the FPC disregarded as "suspect" the so-called Coastal and Trunkline sales. The petitioners urge that these sales are permanently certificated and not subject to any further FPC or court review, modi-

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[44] 28 F.P.C. 401.

[45] 29 F.P.C. 593.

[46] The in-line price of 15¢ was affirmed by the District of Columbia Circuit in *Skelly, supra.*

fication or infirmity. But we cannot say that the FPC acted arbitrarily and capriciously in excluding these sales, for the certificates surely would have been set aside had it not been for a procedural defect (an untimely petition for review filed by Public Service Commission of New York from the FPC's denial of intervention.)[47] Thus, while review may be said to have been unsuccessful, we agree that there was an apparent infirmity and the FPC acted with a discretion that we refuse to overturn.

7% Interest in Refunds

Petitioners, while conceding that the Supreme Court in *Callery* upheld the imposition of interest on refunds as a means to prevent unjust enrichment, complain that 7% imposed in these proceedings[48] cannot be considered equitable, because the parties acted in good faith, and the rate of interest should be in line with the then currently effective present commercial practices, i.e., 4.5% (prime rate) fixed by the Federal Reserve Board and applied in various decisions by the FPC.

In *Callery* the interest assessed was 6% from the time that the gas first was certificated and at the rate of 7% from the time that the initial certificates were set aside and temporaries were issued in place thereof. The Supreme Court affirmed the assessment of interest, *Callery*, 282 U.S. at 230. Here the FPC, unlike *Callery*, did not require petitioners to refund the difference between the price collected under the original certificates while they were in effect and the ultimately certificated in-line price but imposed a refund obligation only from the time the temporaries were issued and ordered interest only from that date. This was

[47] *Public Service Commission of New York* v. *F.P.C.*, D.C. Cir., 1960, 284 F.2d 200.

[48] Opinion 412, par. (f), 30 F.P.C. 1438.

far more favorable to the petitioners than was the procedure in *Callery*.

On remand of *Callery*, this Court by its order of March 29, 1966, summarily denied the petitioner's contention similarly here made that the FPC's orders should be modified to reduce the interest rate to 4½ percent, instead of that of 6 and 7 percent as prescribed.

The 4.5% rate applied by the FPC in other refund cases is not comparable, because the FPC applies this rate only when the company is directed to retain the refundable amount pending a determination of the proper distribution.

We conclude that the 7 percent interest imposed by the FPC was permissible. *Mississippi River Fuel Corp.* v. *F.P.C.*, D.C. Cir., 1960, 281 F.2d 919, cert. den. 365 U.S. 827; *Texaco, Inc.* v. *F.P.C.*, 5 Cir., 1961, 290 F.2d 149.

Change in Rates to Avoid In-Line Limitations

Upon the promulgation of Opinions 412 and 412A setting an in-line price of 15¢ for Districts 2 and 4, and the orders of February 24 and March 20, 1964, establishing a moratorium of 18¢ petitioners in No. 21856[49] while collecting 18¢ filed a notice of change under § 4 (e) from the price ultimately approved in these proceedings (15¢ per Mcf if the opinions 412 and 412A are upheld) to the 18¢ moratorium ceiling. Their second rate filing was rejected on the ground that the petitioners were already collecting 18¢ and the FPC's order directing them to reduce the price to 15¢ was stayed during this appeal.

In District 3 the petitioners who were collecting 20¢ per Mcf filed a notice of rate change that fixed the price at 19¢,

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[49] See note 15, *supra*.

which was accepted by the FPC, suspended for five months and made subject to a § 4 (e) rate proceeding.

Petitioners contend that the rejection of the rate change in Districts 2 and 4 was erroneous and discriminatory.

We think that the FPC's interpretation of the Act was correct. Since the attempted filing price and the one the petitioners were collecting was identical, there was no change, and we conclude that only filings that do change the sales price are authorized by the Act. *Cf. Amerada Petroleum Corp.* v. *F.P.C.*, 10 Cir., 1961, 293 F.2d 572. There was no discrimination in accepting the filings in District 3 because there was a change — a reduction in the cost of gas to the purchaser.

The remaining error relied upon by these petitioners, asserting that the imposition of a price moratorium on the filing of increases above 18¢ and 19¢ until January 1, 1968, was unlawful is deferred to our discussion of a similar point raised by the other petitioners. In all other respects we conclude that the points the Hunt petitioners raise are without merit.

The Post-Policy Statement 16¢ Level

The Distributor-petitioners[50] object to the FPC's finding of an in-line price in District 4 of 16¢ per Mcf after September 28, 1960. They contend that the line price found by the FPC in a contested hearing under proper procedures (here 15¢ per Mcf before September 28, 1960) remains fixed until the applicable area rate proceeding is concluded and the just and reasonable rate is made effective.

The FPC in establishing an in-line price after September 28, 1960, considered sales and initial prices contracted for

[50] See note 7, *supra.*

those sales during the post-Policy Statement periods. The first period extended from September 28, 1960, when the Policy Statement fixed a guideline price of 18¢ for new gas in District 4, until August 30, 1962, when the Fifth Amendment changed that price to 16¢. The second period was from August 30, 1962, through March 25, 1964.

During the first period the estimated first month volumes of gas under non-suspect sales was only 256,576 Mcf, as compared with 4,470,796 Mcf for all gas first entering interstate commerce. There were 34 sales permanently certificated in the *Amerada* case[51] at a conditioned price of 16¢ per Mcf accounting for an estimated first month's volume of 2,549,320 Mcf.

During the second period the estimated first month volume of gas under non-suspect sales was only 910,691 Mcf, as compared with 6,439,858 Mcf for all gas flowing.

There were 26 temporary sales at 16¢ per Mcf related to the contracts in issue here with an estimated first month's volume of 5,379,168.

In making a determination of the in-line price for the sales contracted during the period from the first Policy Statement, September 28, 1960, to the date of the Fifth Amendment, August 30, 1962, while the 18¢ guideline price was in effect, the Examiner considered evidence as to both permanently certificated and temporarily authorized sales contracts and having compared this evidence with the pre-Policy Statement period price of 15¢ concluded that 16¢ should be the maximum initial price appropriate in the

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[51] *Amerada* was then pending on petition for review in the Tenth Circuit and was therefore labeled suspect by the Examiner. *Amerada Petroleum Corp., et al.*, 31 F.P.C. 623, petition for review sub nom. *Sunray DX Oil Co., et al.* v. *F.P.C.* — now decided, 370 F.2d 181.

interest of public convenience and necessity, reflecting the current conditions in the industry during this period.

Coincident with the FPC decision in *Amerada* on August 30, 1962, the FPC by the Policy Statement Fifth Amendment lowered the guideline price to 16¢, and in determining the in-line price for the period subsequent to this date the Examiner gave some weight to the temporarily certificated sales related to the contracts here in issue. He noted that the large number of contracts entered into the 16¢ per Mcf reflected the effect of the Policy Statement Fifth Amendment and that some weight should be given to this consequence of the regulatory action by the FPC. The Examiner, subsequently adopted by the FPC, found 16¢ per Mcf to be the in-line price for this period.

The Distributors, both in oral argument and in their briefs, rely upon the same reasons and arguments as they advanced to the Tenth Circuit in *Sunray DX Oil Company, et al.* v. *F.P.C., supra,* for urging that the FPC erred in holding that the in-line price in District 4 had advanced in the Post-Policy Statement period.[52]

We are in full agreement with the reasoning and conclusions reached by the Tenth Circuit in *Sunray DX*. This decision fully answers the Distributor's contentions concerning sales subsequent to September 18, 1960, and we therefore borrow from it heavily.

With reference to the position of the Distributors that the 15¢ price established in *Skelly,* Opinion No. 362, for contracts executed prior to the date of the Policy Statement is the in-line price rate which is presumed to continue until a just and reasonable rate has been determined, the court said:

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[52] The Distributors also assert here that there is no showing of a public necessity for the gas supplies for which contested certificates were issued, which is treated *infra*.

"We agree with the distributors that the in-line procedure is an interim device and is not intended to be a permanent method of producer regulation. It is a necessary device because of the complex and time-consuming processes incidental to the establishment of a just and reasonable rate. The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.

"The Commission has recognized that the in-line price must reflect current conditions. The Courts of Appeals have agreed. Further support is found in the *Callery* decision, where the Supreme Court referred to 'other contemporaneous certificates' and 'prices higher than existing levels.' We concur with the Commission that once the in-line price is established it is presumed to continue not until the just and reasonable rate is determined but until 'substantial evidence is presented that it has changed.' " Id. pps. 187, 188.

Temporaries as Suspect Prices

Concerning the Distributors' argument that the FPC considered and acted upon suspect prices, the court supported the FPC's consideration of prices under temporary authorizations because permanently certificated prices covered only a small percentage of total volumes for the period involved. It recognized that permanent certificates have a greater weight than either temporary certificates or contract rates under attack in the determination of an in-line price. But the court, nevertheless, went on to say:

"At the same time, when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries. . . ."

> "An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the 'unreviewable fiat' of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates." 370 F. 2d at 189

Referring to Distributors' argument that under *Atlantic Refining Co.* v. *Federal Power Commission*, D. C. Cir. 1963, 316 F. 2d 677, if the FPC is to err in setting an initial rate, it should err on the low side because of the right of a Producer to immediately file for a rate increase under §4. The court in *Sunray DX* rejecting this argument said:

> "The provisions of Section 4, although they may not be disregarded, are not a complete answer. Rate increases filed thereunder are subject to suspension. The producers may have the use of the money collected but is is at interest if refunds are ordered and royalty and tax payments have to be made on the total amount collected. If the just and reasonable rate as finally determined is greater than the in-line rate adopted, the producers have no way of recouping their loss. Our view is that the possibility of filings for increased rates under Section 4 does not require that the Commission fix the price in a Section 7 proceeding at a figure lower than that at which substantial volumes of gas are currently contracted for sale in interstate commerce." 370 F. 2d at 140

Finally, we fully concur in the summary and conclusions reached by the Tenth Circuit in *Sunray DX* so aptly put as follows:

"It is apparent that in the case at bar the Commission was confronted with a difficult situation. CATCO tells it to hold the line. The Ninth Circuit UGI decision says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity is 16¢. We believe that in so doing the Commission acted reasonably and that 'we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation'. We find no abuse of discretion and affirm the 16¢ price." 370 F.2d at 190-191

We are quite aware that the District of Columbia Circuit, in *Public Service Commission of the State of New York vs. Federal Power Commission,* ..... F.2d ..... [No. 19796, Feb. 7, 1967] refused to accept the reasoning of the Tenth Circuit in *Sunray DX*. To the contrary, adopting the Distributors' contention here made the District of Columbia Circuit did freeze the in-line price during the interim period between the sale of gas and the rate determination under § 4 or § 5 of the Act on the logic of *Catco*. As we stated at the outset, we align ourselves with the Tenth Circuit's *Sunray DX* and the Ninth Circuit's holding that "• • • the 'line' referred to in Catco may properly be referenced to relevant existing producer prices under which substantive amounts of natural gas move in interstate commerce • • •." *UGI* v. *Federal Power Commission,* 9 Cir., 1960, 283 F.2d 817.

Relevance of Public Need

In addition to the reasons advanced in *Sunray DX*, and as a separate basis for reversal here, the Distributor-petitioners urge that the FPC's holding that the issue of public need properly belongs in pipeline certificate cases, not producer applications, is erroneous. Consequently the total absence of formal record evidence of a public need for the gas supplies here involved invalidate the contested certificates authorizing the sales. The District of Columbia Circuit agrees with this view. In *Public Service Commission of New York* v. *F.P.C., supra,* that court found that there was no showing of public need and that such a decision must be made before a permanent certificate is granted to a producer.

With deference we disagree. *Callery* simply cannot be squared with any contention that would result in such proliferation of issues and evidence in § 7 proceedings. Congress intended that the FPC would pursue regulatory methods which would permit performance of the task. The FPC has been encouraged to devise reasonable means of streamlining its procedures. *Federal Power Commission* v. *Hunt,* 376 U.S. 515 at 527, 84 S.Ct. 861, 11 L.Ed. 2d 878. The FPC should and does have discretion to consider the question of public need in rule making proceedings or in pipeline certification cases.[53] The complaint that the delay in the adoption of any rule is a good example of the inadequacy of the rule making process underscores the inappropriateness of injecting a public need issue in § 7 proceedings.

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[53] In the rule making Docket R-199 the take or pay problem has been considered on an industry-wide basis. Order No. 334, January 18, 1967. The certificates here in suit are included in this proceeding.

Where there are hundreds of producers in § 7 proceedings who cannot have any knowledge of ultimate demand, the result would be either a forced intervention of the pipelines and prolongation of the hearings, or possible collateral attack on the pipeline certificate cases. To force a general consideration of need in § 7 proceedings would force consideration of that type of market evidence whose exclusion *Callery* specifically sanctioned on the price issue. *California Oil Company, Western Division* v. *Federal Power Commission*, 10 Cir., 1963, 315 F.2d 652; *Texaco, Inc.* v. *Federal Power Commission*, 5 Cir., 1961, 290 F.2d 149.

We decline to require an enlargement of what, until now, has been decided to be the scope of a § 7 proceeding.

Price Increase Moratorium

Producer-petitioner Blanco[54] objects to the certificate condition imposing an 18¢ ceiling on prices until January 1, 1968, or the area rate determination, whichever is earlier.[55] Blanco argues that there is nothing in the record to support the FPC's determination that "the level at which prices will be triggered or redetermined is apparently at the 18¢ price level • • •."

Bound to comply with *Catco*, the FPC's moratorium policy was evolved because initial price regulations alone

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[54] See note 1, *supra*.

[55] Austral (see note 1, *supra*), although making the same objection in its petition, conceded in its brief, filed after *Callery*, that this decision was dispositive of the error asserted by Austral as to the imposition of a price increase moratorium. Bright and Schiff (see note 1, *supra*), who initially made the same objection, by order dated June 21, 1966, was permitted to withdraw its Petition for Review and the proceeding as to it was dismissed.

did not suffice to hold the line. This policy was first accomplished by the issuance of temporary certificates imposing a moratorium on the filing of any increase in the initial price during the term of temporary authorization. In *Hunt* v. *Federal Power Commission*, 5 Cir., 1962, 306 F.2d 334 we held that the FPC had no power to condition a temporary certificate upon the maintenance of a prescribed price. The Supreme Court reversed, *Federal Power Commission* v. *Hunt, et al.*, 376 U.S. 515. In *Callery Properties, Inc.* v. *Federal Power Commission*, 5 Cir., 1964, we held that the Natural Gas Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate. Again the Supreme Court reversed. *Callery, supra.*[56] Thus the FPC's power to impose a moratorium was unquestionably set at rest.

In our view the petitioner here fails in establishing that rate increases above the 18¢ level will not result in triggering of contracts and price escalation.

Blanco argues the negative, that although there are contracts that could be triggered by price increases above 18¢, there is no evidence that this will be done. We reject this and refuse to leave it to the purchaser's decision whether or not for one reason or another they may or may not act. If a rate filing for more than 18¢ is permitted, it would upset much that the FPC has succeeded in accomplishing to comply with *Catco*.

Producer-petitioners Hunt[57] object to the imposition of a price moratorium on the filing of increases above 18¢ in Districts 2 and 4 and 19¢ in District 3, again on the premise that there is no evidence to support either the price or time limitation.

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[56] See note 27 *supra*.

[57] See notes 12, 13 and 15, *supra*.

The FPC raises a threshold question in No. 21575 that the petition was premature because, although the FPC's order of April 17, 1964, denied the application of petitioners for rehearing of that part of the opinion and order 412-A, dated March 20, 1964, which imposed a moratorium on price increases, by footnote it invited a response setting forth any basis for a factual disagreement, and petitioner, on May 14, 1964, filed such a motion which remained undisposed of on May 27, 1964, when the petition in No. 21575 was filed. Then on September 29, 1964, an order was entered by the FPC refusing to modify the moratorium condition and petitioners did not seek rehearing or court review.

Under the circumstances above related, with the FPC on March 20, 1964, expressly denying the petition for rehearing, there was as to this question of law a sufficient compliance with § 19 to warrant the petition for review. Consequently the question raised by the petitioner is properly before us.

On the merits we are persuaded that the temporary moratorium on the filing of price increases in Districts 2, 3 and 4 was a reasonable exercise of the FPC's power. The rates petitioners rely upon as being higher than the moratorium ceiling were themselves rates that had been redetermined under contract clauses triggered by the petitioner's collections of the sales prices here involved, plus an 18¢ sale to United Gas Pipeline Co. Since the rates were being collected, and disregarding the liability to make a refund, the redetermined rates were 19.33333¢ per Mcf. We agree with what the FPC had to say in its order denying petitioner's motion for amendment of the moratorium condition:

> "It is sufficient here to indicate that for purposes of imposing a moratorium against possible price increases above the triggering ceiling we cannot consider prices

which are themselves based on a price we have held to be too high and which was the subject of a hearing on this question at the time of the redetermination: In fact the situation here well illustrates the mushrooming effect that an out-of-line price for a given sale may have on other sales in the area through redetermination clauses and clearly does not justify a bootstrap operation raising the moratorium level we had set." 32 FPC 874 at 876

While there were no rate increases in Districts 2 and 4 which had led to a price redetermination, the possibility that this might occur prompted the FPC to do what it could to preclude this from becoming a reality.

The Tenth Circuit very recently, in upholding the FPC's imposition of a moratorium, said in the Permian Basin Area Rate Proceeding[58] that the FPC not only had the power to declare a moratorium but that "the reasonableness of the exercise of the power is established by the need for price stability, the Commission's expressed willingness to reopen the proceedings to consider the propriety of changes, and the expiration date which is only about a year off." We find no error in the imposition of the moratorium.

Denial of Exceptions from In-Line Price Levels As to Shell

Producer-petitioner, Shell Oil Company (No. 23408), does not attack the in-line price level determined by the FPC in Opinion No. 478, but insists that, under the circumstances, there is a compelling justification requiring an exception to the application of the in-line price to it.

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[58] *Skelly Oil Co., et al.* v. *Federal Power Commission,* 10 Cir., 1967, ... F.2d ....., [No. 8385 et al.] January 20, 1967.

In 1959 Shell contracted with Coastal Transmission Corporation to sell it gas from Texas Railroad Commission District No. 4 at an initial price of 16.5¢ per Mcf. This sale was to supply gas from Coastal's first major expansion of its pipeline. In Opinion 478 the FPC issued to Shell a permanent certificate with a price condition reducing the original price, which Shell can collect under its contract from 16.5¢ per Mcf to 15¢ per Mcf. Subsequently[59] the FPC provided that the initial contract rate would be applicable only from the date of initial delivery to the date the first rate increase was placed into effect subject to refund, on April 1, 1963. After that date the conditioned 15¢ per Mcf rate operated only as a "filed rate" or refund floor, pending the determination of the justness and reasonableness of Shell's rate as a part of the Texas Gulf Coast Area Rate Proceeding.[60]

The "compelling justification" upon which Shell relies is that sales to Coastal contracted in 1955 to supply gas to Coastal's projected original pipeline including one sale from Gulf[61] at the same price as Shell's contract here, were treated as exceptional by the FPC and excluded from consideration in making in-line price determinations. It is Shell's position that "if the Commission was correct in the factual distinction it drew in the *Skelly* and *Texas Seaboard* cases, which was confirmed * * * in *Public Service Commission of New York,* then this same factual distinction serves as a strong reason for not applying the in-line price to other sales to Coastal."

We think the FPC was warranted in concluding that the early sales were "* * * to a new company (Coastal) that

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[59] Order Denying Rehearing, Opinion No. 478, November 24, 1965.

[60] AR 64-2, covering District 4.

[61] Docket No. G-10127.

had neither been given a certificate nor was yet in operation, and so may have taken place at higher prices than would have occurred under contracts with an established pipeline because of the inclusion in the price of an additional risk factor * * *."[62] This was an exceptional situation because at that time Coastal was in a promotional stage. But in 1959 the pipeline had been constructed, was in operation, and its certificate proceedings were judicially determined. We are not at all persuaded by Shell's argument that the same risk existed on the contested pipeline expansion as existed on the initial pipeline certification. We think that the FPC's conclusion of lack of comparability of Shell's sale with the exceptional original sales is amply borne out, and that the difference in price between that allowed Shell in 1959 and that allowed Gulf in 1955 cannot therefore be said to be discriminatory.

Austral, Blanco, Etc.

On September 1, 1960, Producer-petitioners Austral, Blanco and Killian and Hurd contracted with Natural Gas Pipeline Company of America to sell it natural gas for a total initial price of 20.045¢ per Mcf. The temporary certificates subsequently issued to these Producer-petitioners contained a condition reducing the total initial price to 18¢ per Mcf. These Producers urge that the flexible take provisions of their contracts, which make them useful to absorb swings in the pipelines' gas supply needs and as a "storage" facility, is a premium feature for which they are entitled to an increment over the otherwise applicable in-line price.

The Examiner allowed ½¢ per Mcf because of the flexibility provisions of the contract. The FPC overruled the Examiner and refused to allow any price increment for the so-called premium features.

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[62] Texaco Seaboard 29 F.P.C. 593, at 598.

The FPC found that there were a substantial number of contracts with the same pipeline having exactly the same flexible take provisions and that no extra allowance had been granted over the in-line price in any of the certificated cases. "Moreover, the feature is present in all but two contracts executed by the pipelines or its predecessor * * * for purchases in District No. 4 since September, 1960 * * *." This lead the producers to contend that it is arbitrary and capricious for the FPC to consider sales under contracts dated prior to September 28, 1960 (the Policy Statement date) to determine the in-line price for the producer's sales and then look to sales under contracts dated after September 28, 1960, to determine whether the premium features of the sales are unusual. They submit that, if the FPC insists upon using an arbitrary cut-off date for in-line price purposes, then it must use the same cut-off date for determining whether particular features of a sale are unique. We do not agree. The periods before and after September 28, 1960, were separately considered by the FPC in establishing in-line pricing because with ample justification it was felt that the Policy Statement had introduced a new element affecting the in-line price. But the fixing of a period "before" and "after" in reference to the policy statement is irrelevant in connection with contracts having flexible take provisions and those that did not, since such provisions are not responsive to the Policy Statement. We think that the FPC's refusal of a premium price allowance to the Producer, based upon a comparison of contracts dated after September 28, 1960, was supported by substantial evidence.

The Refund Issue

Some of the parties submit that they are entitled to a prompt decision of the refund question. The issue is whether the FPC has the authority under §7 of the Natural Gas Act to require the Producer-petitioners to refund amounts

above the in-line prices previously collected by them pursuant to temporary certificates which contained no express refund condition.

The FPC urges that, in the present posture of the case, the Producers are not aggrieved by the deferral of the refund issue by the FPC and contend that the challenge to the FPC's refund authority is premature, because the FPC has not determined as to any of the petitioners that it has the power to order refunds and, if so, how much is due. This is literally so. But whether it is really so may be quite another matter.

On September 30, 1965, the FPC, in Opinion 478, rehearing denied November 24, 1965, held that "* * * the decision whether refunds should be ordered as a condition to the permanent certificates is deferred for subsequent determination."

However, on July 25, 1966, the FPC in Opinion 499[63] stated that "It is now established that the Commission has both the power and the duty to order refunds where amounts in excess of the in-line price have been collected by a producer operating under a temporary certificate without specific refund conditions." The FPC further said: "Accordingly, refunds will be ordered of all amounts collected in excess of the in-line price established in this proceeding during the periods producers were operating under temporary certificates, * * *"

The FPC on September 2, 1966, granted applications for rehearing of Opinion 499 to permit joint consideration of all applications and has taken no further action.[64]

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[63] This is a part of the Turnbull and Zock proceeding which was the subject of Opinion 478.

[64] At the time of oral argument the court requested the FPC to make available from time to time any action taken by the FPC

We think that in view of the action taken by the FPC "the question of the power of the Commission to order refunds of amounts collected under temporary certificates containing no express refund condition is ripe for determination, and that proper judicial administration requires that it be deferred no longer."[65]

No consideration of healthy administrative procedure suggests either the necessity for or desirability of waiting further, requiring a new and second proceeding for review. Furthermore, the FPC's briefs in support of its petitions for certiorari to the Tenth Circuit cases[66] show that the FPC recognizes that the issue is alive.

The Producer-petitioners argue that the FPC had the power to insert an express refund condition in the temporary certificate, but it chose not to do so. Since the FPC's powers under § 7 are quasi legislative and therefore prospective in application, *Arizona Grocery Co.* v. *Atchison Topeka and Santa Fe Railway Co., et al.*, 1932, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348, it cannot now retroactively impose such a refund condition by awarding reparations of amounts previously collected by the Producers. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281; 88

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that might have a bearing on the issues to be determined in this review proceeding. There has been submitted to us Opinions and Orders of July 21, 1966 (492A), December 6, 1966 (498A and 501A), and December 8, 1966 (502A), in each of which the FPC denied rehearing and stay of Opinions 492, 498, 501 and 502, which directed partial refunds of amounts collected under non-refund conditional temporary authorizations in excess of ultimately determined in-line prices.

[65] *Sunray DX Oil Company, supra*, 370 F.2d at 192. See also *Pan American Petroleum Corporation, et al.* v. *F.P.C.*, 10 Cir., 1967, ... F.2d ..... (Nos. 7912 et al., March 9, 1967); *Standard Oil Co. of Texas, et al.* v. *F.P.C.*, 10 Cir., 1967, ... F.2d ..... (Nos. 9289, et al., March 27, 1967).

[66] See note 65, *supra*.

L.Ed. 333. Further, relying on the Tenth Circuit's earlier *Sunray Mid-Continent*[67] decision the Producers point out that there the court condemned the imposition of an express refund condition in a temporary certificate which did not provide a refund "floor" and held this to be unlawful, because it would require the Producers to commit their gas to interstate commerce without knowing the times and conditions applicable to the particular sale. They dismiss *Callery*[68] by stating that the touchstone of the FPC's refund power there was the fact that the FPC's orders "never became final" and were "overturned by a reviewing court". And their view of *Skelly*[69] is simply that the District of Columbia Circuit presumed the existence of the FPC's power to order refunds because it was not "clear from the Act that the Commission lacked power." This statutory construction, they contend, is plainly at odds with other decisions of that Circuit. *Neild* v. *District of Columbia*, D.C. Cir., 1940, 110 F.2d 246; *Transcontinental and Western Air, Inc.* v. *Civil Aeronautics Board*, D.C. Cir., 1948, 169 F.2d 893, affirmed 336 U.S. 601, 69 S.Ct. 756, 93 L.Ed. 911.

Events certainly fortified their position for the Tenth Circuit in its very recent decisions[70] has held that unless the special considerations recognized in *Callery* are present, refunds may be ordered under § 7 only when a Producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition. The court, quite aware that in *Skelly*[71] the District of Columbia Circuit held that the power

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[67] *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 10 Cir., 1959, 270 F.2d 404.

[68] See note 27, *supra*.

[69] See note 34, *supra*.

[70] See note 65, *supra*.

[71] See note 34, *supra*.

to order refunds does not depend upon an explicit refund provision in a temporary certificate, disagreed and expressed the view that this would lead to incalculable risks for the Producers. The court emphasized that in *Skelly* the application for permanent certificate covered sales under contracts executed before the Policy Statement, whereas in *Sunray DX* the contracts had been made between the date of the Policy Statement and the date of the Fifth Amendment, when the guideline initial rate was 18 cents. The court found this to be significant and meaningful and held that "When the producers dedicated their gas under temporary certificates permitting the collection of prices up to 18 cents without express refund obligation, they were entitled to rely on them." *Sunray DX Oil Company* v. *F.P.C.*, 370 F.2d at 194.

Before the FPC's decision in *Skelly Oil Co., et al.*, 28 F.P.C. 401, in 1962, it had taken the position that any error in granting a temporary certificate could be corrected by a refund order on permanent certification. *Continental Oil Co.* Opinion 351, 27 F.P.C. 96. After the Tenth Circuit's *Mid-Continent* decision[72] the FPC in *Anaconda Petroleum Corporation, et al.*, 29 F.P.C. 218, denied a motion by the Distributor-petitioner herein, that refund conditions be imposed on outstanding unconditional temporary certificates because to do so would have placed the FPC in the "• • • position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them." In January, 1964, the District of Columbia held in *Skelly*[73] that, even though a temporary did not contain an express refund condition, this did not preclude the FPC, under equitable conditions, from requiring refunds of excess amounts.

[72] See note 66, *supra*.

[73] See note 34, *supra*.

Thereafter the FPC deferred action on refunds as heretofore related.

The vacillation of the FPC's position in the refund area must be attributed in no little degree to the uncertainties brought about by the various court decisions on the subject, in which there has been a conspicuous lack of unanimity. The conflict persists, as witness the Tenth Circuit's recent disagreement with the District of Columbia Circuit.

Viewed in the spectrum of *Catco*[74] to the present, we are persuaded that *Skelly* is sound and correct, and we adopt what the court there said:

> "The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices and refund of excessive utility rates is a well-recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates." 329 F.2d at 249.

We think it basic that the in-line price technique was developed by the courts to make sure that the public interest, with its strong emphasis on consumer interest, was to

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[74] The Supreme Court placed a continuing responsibility on the FPC, in certificating procedures, to prevent "out of line" prices and to "hold the line awaiting adjudication of a just and reasonable rate."

be protected from the outset against excessive rates and charges. This is not to say that the power to refund *must* be exercised. If, as and when the power is exercised it must be shown that all equitable considerations involved have been explored and given due weight in the conclusion reached.

We think that the *Callery* rationale is persuasive in the circumstance of this case. The thrust in *Callery* — that the court would not permit the certification of sales of gas at prices exceeding that properly determined to be in the public interest — is identical with the critical issue here. The argument that excessive rates in *Callery* were collected pursuant to permanent certificates, the issuance of which was still the subject of judicial review, while the excesses here were accumulated under temporary authorizations that were not subject to judicial scrutiny, does not carry the day. The Producers knew that the authorizations they received were *temporary*, granted *ex parte* to provide interim relief. The contingency of the temporaries was made known to the recipients by the express condition embodied in them that:

> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require."

Whether or not this is characterized as "boiler plate" language it was sufficient in our opinion to put the Producers on notice of the possibility that refunds of excessive amounts might ultimately be required so that no higher price might be retained than the Producer was entitled to receive under a properly conditioned permanent certificate.

Although the argument was not pressed, the Producers whose contracts were executed after the Statement of Gen-

eral Policy No. 61-1, dated September 28, 1960, suggest that they are entitled to rely upon the price levels therein established, and thus the prices in their temporaries should not be subject to refund. This view was adopted in *Sunray DX*. At the moment, therefore, the District of Columbia Circuit in *Skelly* has held that the FPC has the power to order refunds in pre-Policy Statement contracts and the Tenth Circuit has held that the FPC does not have the power to order refunds in contracts entered into post-Policy Statement.

If the Policy Statement is considered in the context in which it was issued, we do not think that it bears upon the refund issue. In the Statement it is emphasized that, because of the volume of administrative burdens thrust upon it, means had to be found to carry out its duties, "* * * particularly in the interest of the consumer for whose protection the statute was enacted * * *." Further, it is said: "These price levels * * * are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level."

With deference to the Tenth Circuit, we disagree with the reasoning in *Sunray Mid-Continent* and the decisions following it[75] insofar as those decisions reject the power of the FPC to order refunds, if it is made to appear that it is appropriate to do so, in whole or in part, after weighing all equitable considerations.

Other issues raised by the Producer and Distributor petitioners have been considered, and we find them to be without sufficient merit to extend this already too long opinion.

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[75] See notes 65 and 66, *supra*.

We conclude that there is substantial evidence in the record to sustain the findings and action taken by the FPC in fixing the pre-Policy in-line price of 15¢ per Mcf for Texas Railroad Commission Districts 2 and 4 and 16¢ per Mcf for District 3, and the post-Policy price of 16¢ per Mcf for District 4; the denial of the several Producer-petitioners' claims for premium payments; and the imposition of the moratorium on price increases for the limited period established.

The cases are remanded for further proceedings consistent with this opinion.

[SAME CAPTION]

On Petitions to Review and Set aside Orders of the Federal Power Commission

(May 24, 1967)

Before BROWN, BELL and DYER, Circuit Judges

Judgment

This cause came to be heard on the petitions of CONTINENTAL OIL COMPANY; AUSTRAL OIL COMPANY, INCORPORATED; BRIGHT AND SCHIFF; BLANCO OIL COMPANY AND KILLIAN AND HURD; SHELL OIL COMPANY; THE BROOKLYN UNION GAS COMPANY; LONG ISLAND LIGHTING COMPANY; PHILADELPHIA GAS WORKS, DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST; H. L. HUNT, HUNT OIL COMPANY, LAMAR HUNT, TRUSTEE FOR WILLIAM HERBERT HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; GEORGE W. GRAHAM, INC., PLACID OIL COMPANY; HUNT OIL COMPANY; LAMAR HUNT, TRUSTEE FOR WILLIAM HERBERT HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, PLACID OIL COMPANY, for review of orders of the Federal Power Commission issued on September 30, 1965, September 29, 1965, September 24, 1965, January 21, 1966, December 9, 1963, January 24, 1964, February 24, 1964, April 17, 1964, May 6, 1964 and July 2, 1964, in Docket Nos. G-17960, *et al.;* CI 61-427; G-17960; C 161-615; C 161-626; G-18439; G 19,115, *et al.;* and RI 64-733, *et al.;* and was argued by counsel;

IN CONSIDERATION THEREOF, It is now here ordered, adjudged and decreed by this Court that all the orders of the Federal Power Commission in these causes be, and the same are hereby affirmed in part, and reversed in part, and that these causes be, and the same are hereby remanded to the Commission for further proceedings consistent with the opinion of this Court.

Issued as Mandate

In the Supreme Court of the United States

OCTOBER TERM, 1967

AUSTRAL OIL COMPANY INCORPORATED, ESCONDIDO CANYON GAS COMPANY, ET AL., BELRIDGE OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 504, 520, 526

AUSTRAL OIL COMPANY INCORPORATED, BROOKLYN UNION GAS COMPANY, ET AL., BLANCO OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Austral Pet. App. A, pp. 1a–41a; Brooklyn Pet. App. pp. 1a–41a) is reported at 378 F. 2d 510. The opinion and order of the Federal Power Commission (J.A. 436–463)[1]

[1] "J.A." refers to the joint appendix filed in C.A. 5, Nos. 23188, 23189, 23325, 23333, 23408, 23454 and 23455, all of which related to the Commission's order in *Turnbull & Zoch Drilling Co.*, 34 F.P.C. 1001. The petitions for review in these cases were consolidated by the court of appeals with petitions to review a second Commission order entered in a separate, but similar, in-line price proceeding, *Hassie Hunt Trust*, 30 F.P.C. 1438. A separate joint appendix was filed in the proceedings relating to the *Hunt* order. The instant petitions for certiorari relate exclusively to the Commission's order in *Turnbull & Zoch*.

is reported at 34 F.P.C. 1001, and its order denying rehearing (J.A. 483–488) is reported at 34 F.P.C. 1367.

JURISDICTION

The judgment of the court of appeals (Brooklyn Pet. App. 42a) was entered on May 24, 1967. The petitions for writs of certiorari were filed on August 16, 1967 (No. 504), August 21, 1967 (No. 520), and August 22, 1967 (No. 526). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATEMENT

The Commission granted certificates of public convenience and necessity authorizing sales of gas by numerous independent producers in Texas Railroad Commission District No. 4. The certificates were conditioned to require the producers to charge no more than a specified ("in-line") price.[2] The Commission deferred for later consideration the question whether and to what extent refunds should be required of those producers who had charged more than the in-line price pursuant to unconditioned temporary certificates.

The court of appeals affirmed the Commission's in-line price determinations, rejecting, *inter alia*, the

[2] The Commission made three separate in-line price determinations in this proceeding: (1) 15 cents per Mcf for sales antedating the issuance of the Commission's Statement of General Policy No. 61–1, 24 F.P.C. 818 (September 28, 1960), (2) 16 cents per Mcf for sales contracted subsequent thereto but prior to the amendment of the original guideline price established by the Policy Statement, and (3) 16 cents per Mcf for sales postdating the amendment.

argument of the consumer-distributor parties (petitioners in No. 520) that in fixing the 16-cent post-Policy Statement prices the Commission had erroneously relied upon contract prices, temporary certificate prices, and its Policy Statement "guideline" prices. In this respect, the court expressly followed the decision of the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, pending on petitions for certiorari in Nos. 60, 61, 62, and 82, this Term, which also approved a 16-cent in-line determination for post-Policy Statement sales from Texas District No. 4. Conversely, it recognized that its reasoning was contrary to that of the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 373 F. 2d 816, pending on petitions for certiorari in Nos. 111, 143, 144 and 231, this Term.

With respect to refunds, the court held that the question whether the Commission had the power to require refunds was ripe for review and that the Commission does have the power to require refunds under unconditioned temporaries. It expressed its disagreement with the Tenth Circuit's holding in *Sunray DX*, *supra*, and related cases [3] that the Commission lacked such refund power.

Finally, the Court rejected the consumer-distributors' contention that the certificate applications

[3] *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F. 2d 161, pending on petitions for certiorari in Nos. 227, 415 and 516, this Term; *Standard Oil Co.* v. *Federal Power Commission*, 376 F. 2d 578, pending on petitions for certiorari in Nos. 80, 97, and 503, this Term.

should have been denied for lack of an adequate showing of public need for the gas involved. In so ruling, the Court stated its disagreement with the District of Columbia Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission, supra.*

DISCUSSION

The questions presented here are the same as those presented in a number of other pending petitions.[4] We have already expressed our view that the in-line and refund questions warrant review. See our petitions in Nos. 60, 80, 144 and 227. However, for the same reasons noted in our petition in No. 144 and in our memorandum in No. 231, this Court may wish to defer action on the present petitions (as well as on those challenging the *Public Service Commission* decision of the District of Columbia Circuit and the *Pan American* decision of the Tenth Circuit) until final dis-

[4] The refund question presented in Nos. 504 and 526 is the same question raised by our petitions in Nos. 60 (*Sunray DX*), 80 (*Standard Oil*), and 227 (*Pan American*), and by the petitions of other parties in Nos. 61 and 62 (*Sunray DX*), 97 and 503 (*Standard Oil*), and 415 (*Pan American*), all of which relate to the Tenth Circuit's recent decisions holding that the Commission lacks such power.

The in-line price question presented by the petition in No. 520 has previously been raised by the consumer-distributors' petitions in Nos. 61 and 62, this Term, which seek review of the Tenth Circuit's decision in the *Sunray DX* case, *supra*, and by our petition in No. 144 and the producer petitions in Nos. 111, 143 and 231, this Term, which seek review of the District of Columbia Circuit's decision in *Public Service Commission*, *supra.*

The public need question presented by No. 520 is also presented by Nos. 143 and 231.

position of Nos. 60–62, 80, 97 and 503, which relate to the Tenth Circuit's *Sunray* and *Standard Oil* decisions and which fully present the refund and in-line questions.

To be sure, the question of public need raised by petitioners in No. 520 is not involved in those cases. But, as urged in our memorandum in No. 231, review of that issue is not warranted since no real conflict exists between the decision below and the decision in the *Public Service Commission case, supra,* where the District of Columbia Circuit held that the Commission had not adequately considered the issue.

The court below expressed disagreement with the District of Columbia Circuit's decision on the public-need question (Austral Pet. App. A, pp. 26a–27a) on the assumption that that decision requires a burdensome evidentiary presentation on the need issue in every producer certificate case. Thus, the court below referred (*ibid.*) to a "proliferation of issues and evidence in § 7 [producer] proceedings" that, in its view, would necessarily result if the Commission should attempt to follow the decision of the District of Columbia Circuit. As we explained in our memorandum in No. 231, we do not believe that the District of Columbia Circuit's opinion can properly be read as imposing such rigid evidentiary or hearing requirements. In our view, it requires only a more detailed explanation of the result reached by the Commission in that case. Since the requirements imposed by the District of Columbia Circuit's decision—although in our opinion stemming from an erroneous view of the law—would not impose any significant

administrative burden on the Commission or affect the substantive rights of any party, there would appear to be no occasion for further review of that decision.

CONCLUSION

The petitions for writs of certiorari should be held to abide this Court's final disposition of the petitions in Nos. 60–62, 80, 97 and 503.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION, *et al., Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AUSTRAL OIL COMPANY INCORPORATED, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, PAN AMERICAN PETROLEUM CORPORATION, SUN OIL COMPANY AND TEXACO INC.

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STATUTES:

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Section 7, 15 U.S.C. 717(f) 2, 13

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IN THE

Supreme Court of the United States

October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION, *et al., Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AUSTRAL OIL COMPANY INCORPORATED, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, PAN AMERICAN PETROLEUM CORPORATION, SUN OIL COMPANY AND TEXACO INC.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 378 F. 2d 510, and is set out in the Appendix to the Petition in No. 520. The opinion and order of the Federal Power Commission is reported at 34 FPC 1001 (J.A. 435), rehearing denied, 34 FPC 1367 (J.A. 483).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition in No. 520.

STATUTES INVOLVED

Pertinent provisions of Section 7 of the Natural Gas Act are set out on pages 2 and 3 of the Petition in No. 520.

QUESTIONS PRESENTED

1. Does substantial evidence support the Federal Power Commission's conclusion establishing a 16.0¢ per Mcf price line for current sales of natural gas from Texas Railroad Commission District No. 4?

2. Prior to the administrative proceedings below in which the Federal Power Commission authorized specific sales of natural gas by certain producers to several pipeline companies, the Commission had granted certificates to each of the pipeline companies authorizing the resale of such gas. In accordance with long-established precedent, the issue of the pipelines' need for the gas was considered and determined affirmatively by the Commission. In these circumstances, must the Commission reconsider the pipelines' need for such gas in the subsequent administrative proceedings in which the producers' sales to these same pipeline companies are certificated, in the absence of evidence designed to show that the Commission's previous findings of fact on that question are no longer correct?[1]

[1] Because it is not affected by Question No. 1, Austral Oil Company Incorporated joins herewith with respect to Question No. 2 only.

STATEMENT

Respondents applied for certificates of public convenience and necessity to authorize sales in interstate commerce of natural gas from Texas Railroad Commission District No. 4. These applications were consolidated with other certificate applications proposing sales from District No. 4.

At the hearing, the Examiner refused to admit Respondents' proferred evidence "concerning costs, financial and revenue requirements, geological information, supply and demand relationships, and trends and economic evidence" (J.A. 361-362). He then turned his attention to the remaining price line evidence tendered by Staff and Respondents. This evidence included a comprehensive analysis of all relevant interstate sales from the pricing area involved. Additionally, the Examiner considered the testimony of Staff and producer witnesses relating to the impact of the Commission's *Statement of General Policy No. 61-1*, 18 CFR 2.56(a), 24 FPC 818 (1960), and the amendment thereto cited *infra*.[2] Upon consideration of this evidence, the Presiding Examiner found an in-line price of 16¢ per Mcf for post-*Policy Statement* contracts.[3]

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[2] The guideline price level was set at 18¢ per Mcf for Texas Railroad Commission District No. 4, the Commission pricing area involved; this level was later reduced to 16¢ per Mcf; see *infra*.

[3] Sales under contracts executed prior to September 28, 1960, were not placed in issue by the Petition in No. 520. Only "post-*Policy Statement*" contracts, *i.e.*, contracts executed on and after September 28, 1960, the date of the Commission's *Statement of General Policy*, are under consideration here.

This finding was upheld by the Commission in its Opinion No. 478, *Turnbull & Zoch Drilling Co., et al.*, (J.A. 435 at 443-444) and by the court below (378 F. 2d 510 at 523-524).

The Respondents introduced into evidence their respective contracts with the pipeline purchasers to show proof of market (J.A. 364-365). Petitioners introduced no evidence whatsoever. The Presiding Examiner considered these contracts with the pipelines, together with the Commission's prior orders granting permanent certificates to these purchasing pipelines, and specifically found that:

> "* * * all of the pipeline purchasers of natural gas from the applicants herein have been issued permanent certificates to construct the necessary facilities required to receive and transport the natural gas. These certificates could not have been issued unless there existed in the territory proposed to be served customers who could reasonably be expected to use such natural-gas service. *Kansas Pipe Line & Gas Company, et al.*, 2 FPC 29, 45. In this proceeding, therefore, the distributor interveners want a reappraisal of whether there now exist pipeline customers who can reasonably be expected to use the natural gas which will be purchased from the producers herein. Such a reappraisal is not required by the Natural Gas Act and, in view of the proceedings in Docket R-199 referred to hereinabove, is not required in the public interest." (J.A. 366)

The Commission adopted the Examiner's findings on "need" (J.A. 460), and the court below affirmed (378 F. 2d 510 at 526).

REASONS FOR DENIAL OF THE WRIT

The Price Line Issue

The Price Line Issue, the initial question presented by the Distributor-Petitioners, challenges the lower court's affirmance of the Commission's findings establishing a 16¢ per Mcf price line as the certificating level for current sales of natural gas from Texas Railroad Commission District No. 4. The Commission fixed the 16¢ per Mcf line for sales under contracts executed *after* September 28, 1960.[4]

Prior to its opinion below in *Turnbull & Zoch Drilling Co., et al.*, Opinion No. 478, the Commission found a 16¢ per Mcf price line for Texas District 4 post-*Policy Statement* contracts, *Amerada Petroleum Corporation*, Opinion No. 422, 31 FPC 623 (1964). On judicial review, the Court of Appeals for the Tenth Circuit affirmed the Commission's findings fixing the 16¢ per Mcf price line, *Sunray DX Oil Company v. Federal Power Commission*, 370 F. 2d 181 (CA10, 1966). Subsequently, these same Distributor-Petitioners sought *certiorari* to review the Tenth Circuit's decision affirming the 16¢ per Mcf line.[5] That petition is pending in *The Brooklyn Union*

[4] The significance of that date lies in the issuance of the Commission's *Statement of General Policy No. 61-1* establishing for the area in question an initial price standard of 18¢ per Mcf. 24 FPC 818, 820 (1960). On August 30, 1962, the Commission amended its *Statement of General Policy* and established a 16¢ per Mcf standard for Texas Railroad Commission District No. 4. 28 FPC 441 (1962).

[5] Their petition also questions the Tenth Circuit's holding that the FPC could not impose retroactive refund obligations.

Gas Company, et al. v. Federal Power Commission, No. 62, this Term[6] The Producer-Respondents in Nos. 61 and 62 opposed the Distributors' petitions on the price line question. Their answers in opposition are hereby adopted in response to the Distributors' Petition in No. 520.

However, independently of the reasoning supporting the 16¢ per Mcf price line in *Amerada*, Opinion No. 422, the record in this case fully supports the Commission's price line determination below.

In their petition, the Distributors contend that in determining the price line for the sales involved the Commission should have restricted itself to evidence relating to sales being made under permanent certificates only. They argue, as a matter of law, that the Commission may not take into consideration unrebutted evidence relating to current sales being made under temporary certificates and equally unrebutted evidence showing the effect that the Commission's *Statement of General Policy* had upon the price line during the time period in question.

During the administrative hearings, both the Staff of the Commission and the producer certificate applicants presented extensive direct testimony and exhibits demonstrating that the price line in Texas Railroad Commission District No. 4 was at least 16¢ per Mcf

[6] The United Gas Improvement Company also petitioned for *certiorari* to review the Tenth Circuit's *Sunray DX* decision; No. 61, this Term.

for the post-*Policy Statement* period (J.A. 371,376). The Distributor-Petitioners did not object to the relevance of that evidence or offer rebuttal evidence to the contrary. They now contend, without record support, that the Commission erred in considering that evidence and the recommendations made by the Staff and the producer witnesses.

In a thorough analysis of the price line exhibits and testimony, the Presiding Examiner found that the few sales which had been permanently certificated during the relevant pricing period "[did] not provide a sufficient number or volume upon which to base an in-line price determination" (J.A. 394). In these circumstances, the Examiner concluded that, in addition to evidence relating to permanently certificated sales, weight had to be accorded the relevant sales under temporary certificates to reflect current conditions. The Commission specifically adopted the Examiner's findings (J.A. 443).

The Distributors' further contention that the Commission may not lawfully consider evidence showing the impact of the Commission's own *Policy Statement* prices is devoid of any merit. Again, the Distributors ignore the record evidence before the Examiner, his findings of fact and the Commission's adoption of those findings. On this point the record shows and the Examiner found that Staff's 16¢ per Mcf price line evidence was offered to determine "what impact the issuance of the Commission's Policy Statement and amendments thereto had on

the patterns of permanently certificated prices in the area" (J.A. 375). Moreover, producer witnesses testified that the Commission's *Policy Statement* directly affected contract prices and that they had relied on the Commission's *Policy Statement* in the conduct of their business (J.A. 376). Thus, the Distributors' claim is reduced to an unsupported assertion that the Commission should not have considered the effect of its own *Policy Statement* prices.

In its price line decision, the Commission applied the rationale of this Court's *CATCO* decision[7] and subsequent interpretations of it. In the first judicial analysis of *CATCO*, the Ninth Circuit held in its *U.G.I.* decision[8] that the price line should reflect current conditions in the industry and, accordingly, must be based upon prices under which a substantial amount of natural gas presently moves in interstate commerce (283 F. 2d at 824). Subsequently, this Court's *Callery* decision[9] also recognized that a price line must be based on prices at which substantial amounts of natural gas are sold (382 U.S. at 227). Similarly, the Court of Appeals for the District of Columbia in its *Skelly* decision[10] noted that the Com-

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[7] *Atlantic Refining Company v. Public Service Commission,* 360 U.S. 378 (1959).

[8] *United Gas Improvement Company v. Federal Power Commission,* 283 F. 2d 817 (CA9, 1960), *cert. den.,* 365 U.S. 879 (1961).

[9] *United Gas Improvement Company v. Callery Properties, Inc.,* 382 U.S. 223 (1965).

[10] *Public Service Commission of New York v. Federal Power Commission,* 329 F. 2d 242 (CADC, 1964), *cert. den.,* 377 U.S. 963 (1964).

mission had given consideration to prices under temporary certificates in fixing the price line there reviewed and affirmed this treatment (329 F. 2d at 245-246).[11] The District of Columbia Circuit further held that the Commission was not free to ignore its own *Policy Statement* in making a price line determination (329 F. 2d at 247).

The question, in essence, is whether substantial evidence supports the 16¢ per Mcf price line finding. The Presiding Examiner, the Commission and the court of appeals below all thought so. Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), provides that, on judicial review, "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Viewed in this light, the Distributors merely seek this Court's review of a factual determination made by the Commission. See *Illinois Central Railroad Company v. Norfolk and Western Railway Company*, ___U.S.___ (1966), 87 S. ct. 255 at 262, 17 L. ed. 2d 162 at 171.

In their petition, the Distributors claim a conflict between the D. C. Circuit's decision in *Hawkins*[12] and decisions of the Fifth Circuit in *Continental* (below) and The Tenth Circuit in *Sunray DX, supra. Hawkins* involved Commission price line determinations for Texas Railroad

[11] This, of course, was consistent with the Commission's prior holdings in other price line cases that sales under temporary certificates could not be ignored, *Texaco Seaboard, Inc.*, 29 FPC 593 at 597 (1963); *The Ohio Oil Company*, 27 FPC 551 at 553 (1962), *aff'd, Atlantic Refining Company v. Federal Power Commission*, 316 F. 2d 677 (CADC, 1963).

[12] *Public Service Commission of New York v. Federal Power Commission*, 373 F. 2d 816 (CADC, 1967).

Commission District Nos. 2 and 3[13] *Sunray DX* and the *Continental* decision below both involved price line determinations for Texas Railroad Commission District No. 4. Each of these three cases involved separate hearings on different records with necessarily different findings of fact and separate opinions. This is a natural result of the Commission's historical treatment of each of the three Railroad Commission Districts on the Texas Gulf Coast as a separate and distinct geographical area for in-line pricing purposes. Consistently, the Commission's *Statement of General Policy No. 61-1* shows the separate delineation of these three pricing areas (24 FPC at 820).

The Distributors ignore the difference in price line areas involved, as well as the D. C. Circuit's own decision in *Hawkins* where it particularized the factual distinction between the case then before it and the case before the Tenth Circuit in *Sunray DX*, as follows:

> "... the Tenth Circuit was faced with a problem very different from ours. There only 1.39% of the gas sold in the area was permanently certificated.... In our case, there is a substantial volume moving under permanent certificates." (373 F. 2d at 828)

In this case, as the Commission found, the "permanently certificated sales do not provide a sufficient number or volume upon which to base an in-line price determina-

[13] Before the commission, the sales from Texas Railroad Commission District No. 2 were heard on a separate record from sales originating in Texas Railroad Commission District No. 3. However, the Court of Appeals wrote one opinion covering sales from these two districts. See Note 12, above.

tion" (J.A. 394). In these circumstances, the judgment of the court below, affirming the Commission's price line determination for Texas Railroad Commission District No. 4, is clearly distinguishable from the Texas Railroad Commission District Nos. 2 and 3 *Hawkins* case decided by the District of Columbia Circuit. There is no conflict of circuits on this issue.

For all of the above reasons, the Distributors' request for *certiorari* on the price line question should be denied.

The "Need" Issue

The court below affirmed the decision of the Commission which, *inter alia,* held that the pipeline-purchasers' need for gas had been determined in prior hearings and therefore was not the proper subject for a reappraisal in these producer certificate proceedings (J.A. 366). Under the facts presented, this holding is clearly correct. As discussed hereafter, a *particular* pipeline's need for gas supplies is a basic issue which has always been considered by the Commission in pipeline certificate proceedings. With respect to the instant sales, each of the pipeline-purchasers had received all certificate authorization required to receive, transport, and resell the gas sold them by Respondents (J.A. 365, n. 15; 366). In these circumstances, the Commission's previous findings in those pipeline certificate cases established the existence of the pipeline's need for the gas proposed to be sold by the producer certificate applicants.

Had the Petitioners come forward with any evidence purporting to show that the Commission's prior findings were no longer valid or why the pipeline-purchasers no longer needed this gas, then a legitimate issue might have been raised to which affirmative evidence could have been specifically directed. However, Petitioners did not tender any evidence on this question in the administrative proceedings below, but simply maintain that the producer certificate applicants should have presented evidence on this previously resolved point.[14] (J.A. 446).

Paradoxically, Petitioners' concern with "need" arises only when a producer's certificate issues at a price exceeding 15¢ per Mcf (J.A. 446). Seemingly, the "need" by the very same pipeline-purchaser for the very same gas at a price of 15¢ per Mcf, or less, would not have been challenged. It thus appears that the Petitioners' "need" issue is merely a restatement of their position on the price line issue, which they raise in Question No. (1) of their Petition.

That no *bona fide* "need" issue exists in this proceeding is further confirmed by the Petitioners' failure to limit their complaints to producer sales to pipeline companies serving the ultimate consumers in the States of Pennsylvania and New York which Petitioners purport to represent. Petitioners can scarcely be aggrieved by the decision below insofar as it relates to the several sales to Natural Gas Pipeline Company of America, whose transmission facili-

[14] With striking inconsistency, however, Petitioners *supported* the Presiding Examiner's exclusion of the producers' proffered evidence which bore upon the question of public need (J.A. 361-364).

ties terminate in the vicinity of Chicago, Illinois, and serve the Middle-Western "public need" in Illinois and adjacent states. *Wisconsin v. Federal Power Commission,* 373 U.S. 294, 304 (1963). Nor, for the same reason, can Petitioners be aggrieved by sales to Florida Gas Transmission Company, which serves the "public need" in Florida and other Southeastern states. Significantly, the regulatory agencies and the distribution companies of the states directly concerned have raised no "need" issue with respect to these sales.

The Commission's correlative action in considering "need" issues in pipeline certificate cases,[15] ultimately raised by these Petitioners, conforms with its consistent administration of Section 7 of the Natural Gas Act. The administrative decision in the instant case reflects a well-established Commission policy calculated to assure due consideration of an *individual* pipeline's market requirements and data at the time and in the particular proceed-

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[15] The Commission, however, separately considered one aspect of the general subject of "need," the matter of so-called "take or pay" contract provisions between producers and pipelines, in general rulemaking proceedings recently concluded in Docket No. R-199. These rulemaking proceedings were duly noted and upheld as within the permissible ambit of Commission discretion by the court below (378 F. 2d 510 at 526). It should be observed that the certificates here involved were, by express condition, subject to the outcome of the rulemaking proceeding in Docket No. R-199 (J.A. 459). The Commission's orders issued January 18, 1967, and March 21, 1967, in the latter docket effectively moot the "take or pay" aspect of the "need" question raised by Petitioners. See Order No. 334, issued January 18, 1967, and Order No. 334-A, issued March 21, 1967, in Docket No. R-199. Order No. 334 is embodied in Sections 154.103 and 157.25 of the Commission's Regulations under the Natural Gas Act; 18 CFR 154.103, 157.25.

ing where such market evidence is most readily available and can most feasibly be presented. Thus, beginning in the early days of the Natural Gas Act, the Commission held that a showing of customers in the territory sought to be served constituted an essential part of the pipeline's case and that proof of market, supported by an adequate gas supply, must be shown in the pipeline certificate proceeding. *Kansas Pipe Line & Gas Company, et al.*, 2 FPC 29, 45-46 (1939).

This same established policy is fully recognized and implemented in the Commission's Regulations Under the Natural Gas Act which require the pipeline certificate applicant to furnish detailed gas supply and demand data in its certificate application.[16]

From the practical standpoint, it would be extremely unwieldy and awkward, if indeed possible at all, for a *producer* to prove a particular *pipeline's* need in a *producer* certificate proceeding. Such practical objections—and the consequent heavy burden upon the producer if it had to attempt such proof—have also received the attention and recognition of the Commission. Thus, but five years after the advent of producer regulation, it was held[17]

[16] See 18 CFR 157.14(a), including subsection (11) which requires, *inter alia*, a showing of the names and locations of the pipeline's customers, the number of such customers in each of several categories, the pipeline's peak day gas requirements for each category, the explanation of factors used in estimating the pipeline's future gas requirements, and copies of market surveys obtained by the pipeline-applicant during the preceding three years.

[17] *J. M. Huber Corp*, Docket No. G-13800, order issued August 10, 1959 (unreported). See also *Hope Natural Gas Co.*, 19 FPC 405, 407 (1958).

by the Commission that "... to require a showing of the pipeline purchaser's need for gas in its broadest aspects would impose a difficult, if not impossible, burden on the producer applicant" and that "... the requirement of a broad showing of market need would impede the Commission in promptly disposing of such applications."

Experience in the administration of the Act has shown that the pipeline certificate proceeding is the most appropriate place to ascertain a pipeline's market requirements. The data from customer-distributing companies is readily available to the pipeline which continually serves them, deals with them, and gears its operations to the satisfaction of their needs. Indeed, because of this close relationship between the pipeline and its customers, the pipeline is ordinarily the only party in a real position to know and to demonstrate its need for gas. Respecting the producer, if he has a contract with the pipeline for the sale of his gas, he has palpably shown the proof of *his* market, subject, however, to the certification of his pipeline-purchaser (J.A. 364-365); there is plainly no policy or other reason to require the *producer* to adduce further, duplicative data bearing upon the *pipeline's* needs, which the pipeline itself must in any case gather and supply in its own separate certificate proceeding.[18]

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[18] On occasion, the Commission has consolidated producer certificate applications with the related pipeline certificate proceeding for hearing and disposition. [See *e.g., Transcontinental Gas Pipe Line Corporation, et al.,* 20 FPC 264 (1958)]. However, such consolidated proceedings have proved administratively infeasible and, accordingly, the Commission

(Continued on Page 16)

See *Kansas Pipe Line & Gas Company*, cited *supra*, and Section 157.14(a) of the Commission's Regulations Under the Natural Gas Act [18 CFR 157.14(a)].

The Petitioners are essentially attacking the Commission's practical administration of the Natural Gas Act which has developed over a period of many years. In so doing, they seek to reopen for reappraisal prior Commission findings and orders granting certificates to the pipeline-purchasers. They seek to do so, moreover, without tendering any evidence to explain the "reasons why." In this regard, it is clear that the Petitioners should have presented their "need" arguments in the appropriate proceeding where the market requirements were under review; the Petitioners should have pursued their remedies there, by way of rehearing and appeal. The "need" arguments presented here are concluded and foreclosed by the final pipeline certificates—the Petitioners may not now retry the same question again. *Union Electric Co. v. Federal Power Commission*, 326 F. 2d 535, 541 (CA8, 1964), reversed on other grounds, 381 U.S. 90 (1965); *Pan American Petroleum Corporation v. Federal Power Commission*, 268 F. 2d 827, 830 (CA10, 1959).

The governing authorities, in sum, compel the conclusion that the decision below regarding "need" is clearly correct.

Note 18 (Continued)

has in recent years adopted the practice of hearing pipeline cases separately, while consolidating (as in the instant case) all pending producer sales in a definite pricing area.

CONCLUSION

The Petition for Writ of Certiorari in No. 520 should be denied.

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IN THE

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October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

In its memorandum in response to petitions for certiorari in this and related dockets, Respondent Federal Power Commission

1. Agrees that the in-line initial price question (Question 1 presented by the petition in No. 520) warrants review by this Court;

2. Disagrees that the need issue (Question 2 presented by the petition in No. 520) warrants such review; and

3. Urges that the petition in No. 520 be held to abide this Court's final disposition of petitions in Nos. 60-62, 80, 97 and 503 in which review is sought of the decision of the Tenth Circuit in *Sunray DX Oil Company* v. *Federal Power Commission* (*Sunray*), 370 F.2d 181.

Petitioners take exception to the Commission's position on the latter two points.

The Need Issue

Respondent's ambiguous position on the need issue emphasizes the necessity for this Court to resolve the conflict between the decision below and that of the DC Circuit in *Public Service Com'n of State of N. Y.* v. *Federal Power Com'n* (*Hawkins*), 373 F.2d 816.

Respondent's initial contention (Memo., p. 5), that "no real conflict exists" between the two decisions, is simply inconsistent with the facts. It is clear that the court below considered its decision on this issue to be in conflict with that of the DC Circuit, and its opinion frankly says so.[1] It is also clear that, although different producer-sellers and pipeline-purchasers were involved, the two cases dealt with

1. "In *Public Service Com'n of State of N. Y.* v. *Federal Power Com'n, supra,* that court found that there was no showing of public need and that such a decision must be made before a permanent certificate is granted to a producer.
With deference we disagree." 378 F.2d 510, at p. 526.

the same issue, presented in the same way, by the same parties, and it is hardly disputable that the courts reached opposite conclusions.

Nevertheless, petitioners would not find it necessary to press their request that the conflict be resolved by this Court, had respondent come forward forthrightly with the assurance that the Commission was prepared to adopt the same remedial action in this case as it concedes is required in *Hawkins*. That assurance, however, is conspicuously and significantly omitted from respondent's memorandum.

While respondent acknowledges that the DC Circuit's *Hawkins* decision requires at least "a more detailed explanation of the result reached by the Commission *in that case*" (Memo., p. 5, emphasis supplied) and while it is conceded that the requirement does not impose any significant administrative burden on the Commission, respondent has made no commitment to undertake similar action *in this case* or any other in which the same issue may arise.[2] In the absence of such a commitment, it is perfectly plain that a very real and important conflict exists between the decision below and that of the DC Circuit and that, without the grant of certiorari, this conflict may be perpetuated in the ultimate resolution of the two cases. Even more important, in view of respondent's refusal to acknowledge

2. Ironically, the original "explanation of the result reached" was far more detailed in *Hawkins*, in which respondent concedes the obligation to furnish a "more detailed explanation," than in the instant case, in which respondent has not indicated willingness to take any further action. In Opinion No. 478, the Commission decision reviewed in the proceedng below, the sole "explanation" for the result reached was that petitioners' contentions on the need issue had been "answered in *Hawkins* where we held that 'the issue of public need properly belongs in pipeline certificate cases, not producer applications'." J. A. 446.

the applicability of the DC Circuit's decision to any case other than *Hawkins,* the conflict is likely to be intensified by subsequent Commission decisions which will be subject to appeal, depending on the party aggrieved, in either the Fifth or DC Circuit.

Under the circumstances, clarification by this Court of the Commission's responsibility in producer certificate cases with respect to the crucial issue of evidence of need for the gas, is urgently required.

The Request to Defer

In support of its request that action on the petition in this case be deferred pending action on the petitions seeking review of the Tenth Circuit's *Sunray* decision, respondent relies on the reasons set forth in the FPC's petition in No. 144 and its memorandum in No. 231. In support of their opposition to this request, petitioners rely on the reasons set forth in their memorandum (as respondents) in Nos. 111, 143 and 144. Except for the filing of petitions for certiorari in the instant case in the summer of 1967, the procedural posture of the cases is essentially the same today as it was when that memorandum was prepared.

In that memorandum petitioners urged that simultaneous consideration of the *Sunray* and *Hawkins* cases was essential to an accurate understanding of the factors which actually moved the Commission to elevate its price line for the period after September 1960. We suggest that simultaneous consideration of those cases and this one will be even more illuminating on that subject, since this case was

a direct successor to *Sunray,* involving the same producing area, and the Commission's principal justification for the initial price determination reached here was the price line it had authorized for the *Sunray* sales.

For the foregoing reasons, petitioners respectfully reassert their request for the grant of certiorari in this case.

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